RDPC Revista de Direito Público Contemporâneo
ISSN 2594-813X
expediente@rdpc.com.br

Constitutional State Dilemmas: From Treaty Expectations to Domestic Legislative Furor*

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*The article was accepted for publication in the *Revista de Direito Público Contemporâneo* (Journal of Contemporary Public Law) (RDCP) in November 2018. Presented at the *III Congresso Argentino de Justiça Constitucional* (3rd Argentine Congress of Constitutional Justice) on 14 November 2018. Vicente López, Argentina.

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Abstract: In this article, we examine how the last open constitutional warrant of criminalization of the roll listed in item XLIII of article 5th of the Brazilian Federal Constitution of 1988 was translated into allegedly anti-terrorism legislation through the publication of Law No. 13.260/16, in the wake of street demonstrations of 2013, and on the eve of the 2016 Olympic Games. Our hypothesis is that the normative density of the Brazilian Constitutional State's foundations makes both the concept of constitutional justice and that of fundamental rights complex and pushes them beyond the traditional boundaries of the state's punitive power in favour of the individual and against the state. Consequently, fundamental rights end up transcending the dimensional domain centred on the person and become fundamental social objectives. This constitutional paradigm contains a clear tension in itself, given the anticipated duplicity of the role of the state, and the worrisome uncertainty surrounding what really to expect from a state with the mission to protect fundamental social objectives in its concrete role to safeguard the population from terrorism. Our conclusion is that the legislative response to the international commitment to criminalize terrorism through the numerous treaties mentioned is incomplete and inadequate, distancing itself from the aspirations of the signed international treaties and incurring in the mistake of ignoring the already contradictory distinction between terrorism and political crime. It resulted in the creation of a legislative instrument with a number of open norms, which reduced the crime of terrorism to a crime of danger, erroneously insisting on an outdated view regarding the preventive nature of the criminal sanction, ignoring the case law of the Federal Supreme Court on the subject, and raising plausible questions about the true spirit of the law.

Keywords: terrorism, political crime, international treaties, constitutional warrant of criminalization, constitutional state.

Resumen: En el presente artículo analizamos cómo se tradujo el último mandato constitucional de criminalización aún pendiente en la lista del inciso XLIII del art. 5^0 de la Constitución Federal brasileña de 1988, en legislación presuntamente antiterrorismo, a través de la edición de la Ley 13.260/16, en el contexto tras las manifestaciones callejeras de 2013 y en vísperas de los Juegos Olímpicos de 2016. Nuestra hipótesis es que la densidad normativa de las bases del Estado Constitucional brasileño torna complejos tanto el concepto de justicia constitucional como el de derechos fundamentales y los empuja más allá de los clásicos límites del poder punitivo del Estado a favor del individuo y contra el Estado. De este modo, derechos fundamentales terminan sobrepasando la esfera dimensional centrada en el individuo y pasan a ser también objetivos fundamentales colectivos. Este paradigma constitucional contiene una clara tensión dada la duplicidad de papeles esperada del Estado, además de la preocupante indeterminación de lo que significa un estado defensor de objetivos fundamentales colectivos en su situación concreta para la protección de la colectividad contra el terror. Nuestra conclusión es que la respuesta legislativa al compromiso firmado en ámbito internacional a través de los innúmeros tratados mencionados de incriminación del terrorismo dejó bastante que desear, distanciándose de las aspiraciones de los tratados firmados, fallando al ignorar la ya conflictiva distinción entre crimen de terrorismo y crimen político. Acabó por crearse un instrumento legislativo con una serie de términos abiertos, reduciendo el crimen de terrorismo a un crimen de peligro, insistiendo equivocadamente en una obsoleta visión acerca del carácter preventivo de sanción penal, ignorando la jurisprudencia del Supremo Tribunal Federal sobre el asunto y levantando plausibles cuestionamientos sobre el real espíritu de la ley.

Palabras clave: terrorismo, crimen político, tratados internacionales, mandato de criminalización, Estado Constitucional.

"Laws, like sausages, cease to inspire respect in proportion
as we know how they are made."
John Godfrey Saxe

1. INTRODUCTION

Iuria Novit Curia has always seemed to this author a rather perverse brocard. Perhaps because I grew up in a judicial system characterised by a legislative furor and obsession that go far beyond passing alibi legislation, it seems absurd to expect the jurisdiction to be familiar with all existing laws.[1]

Of course, the Latin brocard refers to a broader concept, but it is difficult not to analyse it from the perspective of a sea of approximately 5,471,980 legal norms issued between the enactment of the current Federal Constitution on October 5, 1988, and September 30, 2016, according to data from the Brazilian Institute of Planning and Taxation (IBPT), at a staggering average of 535 legal norms daily, or 769 legal norms per working day.[2]

The federal legislative frenzy includes the edition of 163,129 legal norms, always in the same period mentioned above. It consists of six constitutional revision amendments, 97 constitutional amendments, two delegated laws, 95 complementary laws, 5,590 ordinary laws, 1,356 original provisional measures, 5,491 reissues of provisional measures, 11,995 federal decrees, and 138,479 complementary regulations.[3]

The states published an astounding total of 1,460,985 general legal norms, of which 335,109 were complementary and ordinary laws, 485,994 decrees, and 639,885 complementary rules. According to the same IBPT study, the legislators of the 5,567 municipalities that existed at the time adopted a staggering 3,847,866 regulations, including 659,629 complementary and ordinary laws, 730,990 decrees, and 2,447,474 complementary rules.

If we analyse this daunting effort from the perspective of a week's working days, we have an impressive 22.93 federal regulations per working day in the first 28 years of the 1988

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[1]This view was also expressed by the State Judge Thiago Brandão de Almeida, President of the *Associação de Magistrados do Piauí* (Association of Magistrates of Piauí) (AMAPI), in a lecture that was delivered on July 16, 2018, at the *Teatro José Aparecido* in Belo Horizonte, Brazil, as part of the I International Seminar on Integration Law.

[2] AMARAL, Gilberto Luiz do; OLENIKE, João Eloi; AMARAL, Letícia M. Fernandes do; YAZBEK, Cristiano Lisboa. *Quantidade de Normas Editadas no Brasil*: *28 Anos da Constituição Federal de 1988*. [Number of Legal Norms Published in Brazil: 28 Years of the Federal Constitution of 1988]. Curitiba: IBPT. 2011. Report. 71 pages. Available at:<https://ibpt.com.br/img/uploads/novelty/estudo/2603/QuantidadeDeNormas201628AnosCF.pdf>. Accessed on: 13 October 2018.

[3] Legal norms here seen in a *lato sensu* perspective, including ordinances, normative instructions, service orders, declaratory acts, normative opinions, etc.

Federal Constitution. In the same period, the 26 Brazilian states and the Federal District combined introduced an average of 205.38 rules each day, or 7.61 rules per working day per federative unit. During the 28 years analysed, the 5,567 Brazilian municipalities each issued an average 691.19 regulations.[4]

In addition to this "legislative tsunami", there is a plethora of accumulated legislation: the current legislature is poised to end its term without passing 80% of the submitted proposed bills. It should be noted that there are around 10,000 other bills that could potentially fall under the purview of *Iuria Novit Curia.* Only 5% of Chamber of Deputies' 513 members of the previous legislature were able to pass a bill.[5]

We will not engage in a discussion about the cruelty it is to presume publicity of such normative acts and expect that the average citizen in remote corners of the country, where functional illiteracy approaches 30%, should be aware of such a legislative torrent.[6] It is already unlikely that the jurisdiction will be aware of it.

If we examine the Magna Carta of 1988, the sixth constitution in our republican history and the seventh as a nation if we consider the Constitution of 1824 of the Empire, we will notice that it has been warped at an average pace of one amendment every three months[7]. The 1916 and 2002 civil codes in our republican history were the subject of a total of 66 legislative interventions. If we only consider the period between 1988 and the present, the two civil codes have been amended 42 times. The Constitution was amended 99 times in that same period. Our infra-constitutional civil legislation appears to enjoy more stability than our founding pact.[8]

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[4] Given the large difference in municipal holidays across the country, it was deemed preferable to report municipal data in days.

[5]BRAGON, Ranier. Só 5% da câmara tem projeto aprovado [Only 5% of the Chamber's bills have passed]. *Folha de S. Paulo*, Brasília, October 04, 2014. Available at: <https://www1.folha.uol.com.br/poder/2014/10/1527087-so-5-da-camara-tem-projeto-aprovado.shtml>. Accessed on: 13 October 2018.

[6] For additional information, we direct the reader to CARDOSO, Plauto C. L. *Crying Wolf*: flertando com o desmanche do Estado democrático de Direito [Crying Wolf: flirting with the dismantling of the democratic State of Law]. Prologue by Plauto Cardoso. In: *Desafíos para la seguridad y defensa nacional de Colombia: Teoría y Praxis* [Challenges for Colombia's national security and defence: Theory and Praxis]. Bogotá: Escuela Superior de Guerra, 2017. Cap. 5, p. 179-200. Available at:
<https://esdeguelibros.edu.co/index.php/editorial/catalog/book/19>.

[7] Intriguingly, the first amendment to the Constitution, which was ratified in March 1992, addresses the following topic of utmost public importance: "It also includes compensation for state deputies and local councillors". One of the most recent changes, Amendment 96, enacted in June 2017, seeks to legitimise animal cruelty in what is known as *"Vaquejada*" through lobbying and in response to a decision by the Brazilian Federal Supreme Court (STF), which is specifically hostile to the topic. The amendment was pompously described as follows: "It adds § 7th to article 225 of the Federal Constitution to establish that animal-using sporting practises are not considered cruel under the conditions specified". Priorities continue to be notably disconnected from voters and the society in which we live. Available at:
<http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/quadro_emc.htm>. Accessed on: 15 June 2017.

[8] MOREIRA, Rogério de Meneses Fialho. Lecture given at the School of Law of the University of Buenos Aires (UBA), Buenos Aires, Argentina: 30 May 2017, *VI Jornada Internacional Direito e Justiça* (VI International Journey of Law and Justice) (from 29 May to 1 June 2017).

From a qualitative standpoint, the source of this legislative drive points to a less-than-honourable characteristic of the country's legislative activity: a severe lack of engagement with the populace. Laws are produced and adopted in such a rush that even participating legislators are occasionally taken aback by the introduction of new laws into our legal system. Legislative debate is non-existent or extremely rare.

In contexts like Brazil's or Argentina's, in which a deep crisis of representativeness has installed itself in the heart of the political establishment and in which there are almost no tools for monitoring the exercise of legislative mandates, the likelihood of a lack of synergy between the popular will and that expressed by their elected representatives is significant. This perception is strengthened in the Brazilian context by the magic formula of the electoral coefficient, which is applied to so-called proportional elections for local, state, and federal legislators. In fact, of the 513 Brazilian federal deputies in the current legislature, only 28 were elected with votes of their own. Therefore, everyone else caught a "ride" to get to the mandate. It is no wonder the shock of a nation that could not recognise itself in the noble legislators who stepped out to vote on behalf of the father, the son, the holy spirit, the wife, etc., during the recent impeachment of former President Dilma Rousseff.

It should not be forgotten that a substantial portion of the resulting legislative backbone is unconstitutional. In the case of Rio de Janeiro state, for instance, there are estimations that are difficult to believe: 80 percent of its legislation would be legally flawed from the outset and unconstitutional.[9]

In 2010, 77% of the legal production of the state of Minas Gerais, one of the leading states in this ravenous legislative marathon, were related to the declaration of public usefulness of civil society institutions, such as NGOs and associations. In the same year, 78% of the legislation in the state of São Paulo fulfilled the same objective as their counterparts in the state of Minas Gerais or were issued to name some form of public space.[10]

The list of peculiarities is, of course, extensive. In the same year of 2010, the São Paulo state legislators displayed their worthiness by instituting laws such as Law No. 14.153/2010, which establishes 31st of August as the "Day of the Eastern Stars", or Law No. 14.109/2010, which designates the last Tuesday of August as the "Day of the Plated Jewellery".

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[9]DUARTE, Alessandra; OTAVIO, Chico. Brasil faz 18 leis por dia, e a maioria vai para o lixo [Brazil creates 18 laws per day, the majority of which go to waste]. *O Globo*, Rio de Janeiro, 18 jun. 2011. Available at: <https://oglobo.globo.com/politica/brasil-faz-18-leis-por-dia-a-maioria-vai-para-lixo-2873389>. Accessed on: 10 October 2018.

[10]Ibidem.

In addition to not knowing the exact number of laws in operation and having a culture of a legal production that is disconnected from the immediate needs of the populace, there is one more harmful ingredient in the country: the continual state of emergency that justifies everything as described by Jorge Bercholc.[11]

It is against such a backdrop that this study analyses how the last open constitutional criminalization warrant was transformed into allegedly anti-terrorist legislation with the publication of Law No. 13.260/16, particularly in the wake of the post-2013 street demonstrations and just before the 2016 Olympic Games. From the crimes mentioned in subsection XLIII of Article 5 of the Federal Constitution[12], only terrorism had not yet been legally accommodated, despite the minority doctrine's contention that Law No. 7.170/83, conceived in a dictatorship environment, already criminalized terrorist activities.

Our hypothesis is that the normative density of the bases of the Brazilian Constitutional State imposes a positive response from the state for the protection of collective fundamental rights – such as peace and public security-, going beyond the classical doctrine on the very reason for being of a constitution as a source of individual protection against the excesses of a latent Leviathan, to impose on this same state the role of active protector of such fundamental rights. This constitutional paradigm incorporates a duplicity of role that in the criminal sphere can lead to disruptive and destabilising ambiguities such as the new requirement to punish preparatory acts against the danger of terrorism, introduced by Law 13.260/16.

Our conclusion is that the legislation in question fails as it ignores the country's commitments upheld in various international treaties, and that, by avoiding or failing to define autonomously the crime of terrorism as well as ignoring its already conflicting distinction from political crime, it created a legislative instrument with a series of open terms, ignoring the Federal Supreme Court's jurisprudence on the subject and raising plausible questions about the true spirit of the law.

The methodology employed is based on research of pertinent doctrine, jurisprudence of the Brazilian Federal Supreme Court (STF), data analysis of quantitative and qualitative research on Brazilian legislative output and newspaper articles.

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[11] We refer the reader to the fundamental BERCHOLC Jorge O., Editor-Director. *El Estado y la emergencia permanente*. [The state and the permanent state of emergency]. Buenos Aires: Editorial Lajouane, marzo de 2008.

[12] Article 5, XLIII - acts of torture, illicit trafficking in narcotics and similar drugs, terrorism, and crimes regarded as heinous shall not be bailable or subject to grace or amnesty by law; those who order, commit, or omit themselves while being able to prevent such crimes shall be held liable. Available at:
< https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/brazil_federal_constitution.pdf >.

2. THE CONSTITUTIONAL STATE AND THE OBLIGATION TO CRIMINALIZE AS A FUNDAMENTAL RIGHT

Without a system of separation of powers and a written constitution, the Roman Republic lasted for an astounding 500 years.[13]. Is the Constitution the appropriate instrument to govern our future? This is a legitimate question. Before and after the year 1787, there were and there still are both just and unjust societies, with and without constitutions.

In the lattes Brazilian presidential election, the two candidates who advanced to the second round appeared to agree on only one point: one of their first initiatives, if elected, would be to replace the current 1988 Federal Constitution with a new one that would be fair and truly representative. The legislative fury is now autophagic.

The dissonance and circulation of semiotic bombs in a bipolar context — here, in the medical sense, and not the already prevalent bipolarisation that appears to be a worldwide political illness — culminated with both parties moving away from such claims in the second round.

It is worth noting that it was never deemed by either candidate the possibility of not having a constitution. The controversial military general, who was a candidate for vice president of one of the parties, proposed a list of notables, chosen vertically, very much in the style of the barracks. The leader of the opposing party, a lawyer and law professor, appeared to propose convening a new constituent assembly on fundaments not listed in the current "Carta", which would likewise entail a breakaway from the existing constitutional order.

Constitutions are recent instruments in the history of humanity. No matter how far back in time one searches for comparable texts, their known contemporary materiality leads us to Philadelphia, Pennsylvania, in the Unites States, on September 17, 1787. What does 231 years represent in historical terms? Constitutions are not designed to be disposable, regardless of how new the concept and the mechanism may be, and the recent history of Latin America is witness to the catastrophic repercussions of such inconsequential flirtation with structural political instability.[14]

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[13] For additional information on this Roman context, we recommend the reader to the fundamental BARAHONA GALLARDO, Claudio. *El Fin de la Dictadura en Roma: La Lex Antonia de Dictatura Tollenda* [The End of the Dictatorship in Rome: The Lex Antonia de Dictatura Tollenda]. *Revista Chilena de Historia del Derecho.*Chile, Universidad de Chile, no. 23. 2011, p. 99-118.

[14] For a more in-depth analysis of Brazil's recent flirtation with authoritarianism, we direct the reader to CARDOSO, Plauto C. L. *Crying Wolf*: *flertando com o desmanche do Estado democrático de Direito*. [Crying Wolf: flirting with the dismantling of the democratic Ruel of Law]. Preface by Plauto Cardoso. In: *Desafíos para la seguridad y defensa nacional de Colombia: Teoría y Praxis* [Challenges for Colombia's national security and defence: Theory and Praxis]. Bogotá: Escuela Superior de Guerra, 2017. Cap. 5, p. 179-200. Available at:<https://esdeguelibros.edu.co/index.php/editorial/catalog/book/19>.

Existential concerns aside, the Constitutional State as a progression of the Rule of Law and the Democratic and Social Rule of Law, still seems to be our highest evolutionary milestone and the pinnacle of a politically organised society.

As unsettling as it may appear to treat incrimination as a fundamental right, as suggested by this chapter's title, Renata da Silva Athayde Barbosa clarifies that[15]

> [...] Its placement in "Title II-Fundamental Rights and Guarantees" and "Chapter I-Individual and Collective Rights and Obligations" is not accidental. In this instance, the constitutional topography shows a new face of fundamental rights, that of individual protection.
>
> The paradigm adopted is one in which the state acts to defend the fundamental right by a positive provision, actively protecting it from attacks by third parties or members of the state itself. In this circumstance, in addition to being subjective rights, fundamental rights also function as "fundamental objective principles of the community"[16] (emphasis added).

In this context, both the concept of constitutional justice and that of fundamental rights become complex and transcend the classical limits on the punitive power of the state in favour of the individual and against the state; fundamental rights extrapolate the dimensional sphere centred on the individual and become also collective fundamental objectives. In this new theoretical framework, constitutional justice no longer operates under the dichotomous dilemma of prohibition and legitimation of the penalty, but now encompasses the actual implementation of criminal consequence as an authoritative response of the state in favour of the collectivity.[17]

This hybridism encloses in itself a clear tension, given the duplicity of roles expected of the state as well as the indetermination of what a state that defends collective fundamental objectives would entail in its concrete role to protect against terror. We shall see that the level of indetermination is such that not even the analysed legislation defines clearly what terror is.

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[15]BARBOSA, Renata da Silva Athayde. *Terrorismo e a Lei nº 13.260/16 no Brasil – considerações críticas* [Terrorism and Law 13.260/16 in Brazil - critical considerations]. In: VIDAL, Adriana Oliveira; RIBEIRO, Raisa Duarte da Silva; COSTA, Rodrigo de Souza (Org.). *Temas Contemporâneos de Direitos Humanos* [Contemporary Themes of Human Rights]. São Paulo: Liber Ars, 2017. Cap. III, p. 208.

[16] FELDENS, Luciano. *Constituição e Direito Penal: o legislador entre a proibição, a legitimidade e a obrigação de penalizar* [The Constitution and Criminal Law: the legislator's role between prohibition, legitimacy, and the duty to penalize]. In: *Novos Rumos do direito Penal contemporâneo* (Coord.: Andrei Zenhkner Schmidt). Rio de Janeiro: Lumen Juris, 2006, p. 47 (apud BARBOSA, 2017, p. 208).

[17] PALAZZO, Francesco C. *Valores Constitucionais e Direito Penal* [Constitutional Values and Criminal Law]. Porto Alegre: Fabris, 1989 (apud Barbosa, 2017, 208-209).

Barbosa[18] explains that, in Maria Conceição Ferreira da Cunha's opinion[19],

> [...] the Constitution has two facets: protection of the individual against governmental authority, especially criminal power, and protection of fundamental values through state action. The turning point in the acceptance of this new paradigm is when the state stops to be an adversary of fundamental rights and becomes an ally in their advancement.

Nonetheless, as idealistic as this dual state function may appear conceptually, from the commitment assumed in international pacts to its legislative internalisation, this aspect of the state as a defender of basic rights faces obvious problems. In this regard, the Law No.13.260/16 contains silences that are deafeningly eloquent, and as we shall demonstrate below, it is not a matter of pointing the finger at the classic dilemma of double indeterminacy of the law or at poor legislative procedure. These are political choices.

3. FROM THE PACTS TO THE INTERNAL REALITY: Brazil's legislative response

There is no question that signing a collective commitment to fundamental rights by nations in the international realm is inevitably accompanied by optimism. In this respect, the Brazilian government's commitment to criminalize terrorism precedes the 1988 Federal Constitution.

We have signed and ratified several international pacts, including the Convention on Offences and Certain other Acts Committed on Board Aircraft (Decree No. 66520/1970), the United Nations Convention for the Suppression of Unlawful Seizure of Aircraft (Decree No. 70201/1972), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Decree No. 72383/1973). In 1997, under the aegis of the current constitution, we signed and ratified both the International Convention for the Suppression of Terrorist Attacks with Explosives (Decree No. 4394/2002) and the International Convention for the Suppression of Financing Terrorism (Decree No. 5640/2005).

Submerged in its traditional penal obsession and incurable faith in the preventive powers of the criminal penalty and in line with the penal enlightenment of the 18th century in which it still seems to reside, and faithful to parameters that would make Cesare Beccaria very

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[18]BARBOSA, Renata da Silva Athayde. Terrorismo e a Lei nº 13.260/16, op. cit. p. 209.

[19] CUNHA, Maria da Conceição Ferreira da. *Constituição e Crime: uma perspectiva da criminalização e da descriminalização.* [Constitution and Crime: a perspective on criminalization and decriminalization]. Porto: Universidade Católica Portuguesa Editora, 1995 (apud BARBOSA, p. 209).

proud, the Brazilian legislator decided to treat terrorism as a crime of danger, an election made unmistakably clear by the choice of the expression "endangering people," as we shall see below.

Thus, Article 2 of Law No. 13.260/16 defines terrorism as follows: [20]

> Article 2: Terrorism is the practise by one or more individuals of the acts specified in this article out of xenophobia, discrimination, or prejudice based on race, colour, ethnicity, or religion, with the intent to "provoke social or generalised terror, endangering people", property, public peace, and public safety (emphasis added).

Expressions such as "provoking social or generalised terror" remain undefined, giving rise to questionable and ambiguous interpretations in relation to this new constitutional role of the state as an auxiliary in the protection of fundamental rights, and in particular of the fundamental objectives of the collectivity. What will be defined as such?

It is intriguing that the legislator's choice excludes political motivation. The legislator's possible attempt to drag the debate on what constitutes a political crime away from the very law that disciplines the constitutional warrant and the Brazilian commitment assumed through international treaties to criminalize terrorism is a serious flaw that ignores one of its main motivations. Even the Federal Supreme Court's jurisprudence on the subject was disregarded.[21]

The distinction between political crime and terrorism-related criminality is not the focus of our current investigation. However, one cannot help but be frustrated by the legislator's squandered opportunity to shed light on a dispute that has already dragged on for decades in the courts. In the words of Renata da Silva Athayde Barbosa:[22]

> It also disregards one of the factors generally considered by the Federal Supreme Court when analysing the matter, namely political motive, because despite the fact that terrorism is not considered a political crime, its political motivation or special intent cannot be disproved. Thus, in attempting to avoid a delicate approach to the problem, the legislator overlooked the opportunity to define specific parameters that distinguished terrorism from political crime.

Available at: <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13260.htm>. Accessed on: 14 October 2018.

[21] In this regard, according to the vote of Minister Celso de Melo in Extradition 855; the vote of Minister Rapporteur Otavio Galloti in Extradition 700; the vote of Minister Rapporteur Moreira Alves in Extradition 399; the vote of Minister Rapporteur Sepúlveda Pertence in Extradition 694; the vote of Minister Sidney Sanches in unanimous decision; the vote of Minister Oscar Correa in Extradition 417; the vote of Minister Celso de Melo in Extradition 855; (all cited by BARBOSA, 2017, pp. 213-218).

[22] BARBOSA, Renata da Silva Athayde. *Terrorismo e a Lei n° 13.260/16* [Terrorism and Law No. 13.260/16], op. cit. p. 219.

The focus of our concern is on the role expected of the “good-guy state”, as opposed to the traditional “bad-guy state”, in ensuring respect for fundamental rights in the face of the aforementioned dual facet of its role in providing protagonist responses as well as refraining from act on the same issue, i.e., the protection of fundamental rights from the point of view of both the individual and the collectivity simultaneously.

In addition to the well-founded concern regarding the right to select the semantic weight of the indeterminate concept of "terror," there is also the fear over what the ever-present Leviathan might define as the "unequivocal purpose" of committing the crime of terrorism.

Otherwise, let us examine article 5 of the law in question (emphasis added).[23]:

> Article 5: Carrying out preparatory acts of terrorism with the **unequivocal purpose** of consummating such an offence:
>
> Penalty: The punishment for committing such an offence was reduced by one-fourth to one-half.
>
> Article 1: Will be subject to the same punishments as terrorist act conspirators, agents who:
>
> I - recruit, organize, transport, or arm people who travel to countries other than their place of residence or nationality; or
>
> II - provide or receive training in a country other than that of their residence or nationality.
>
> Article 2: In the hypothesis indicated in Article 1, if the conduct does not require training or travel to a country other than the person's place of residence or nationality, the penalty for the crime committed will be lowered by one-half to two-thirds of the penalty for the completed offence.

How not to remember the film Minority Report?[24]

[23]Available at: <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Lei/L13260.htm>. Accessed on: 14 October 2018.

[24]MINORITY report: Director: Steven Spielberg. USA: 20th Century Fox, 2002. 1 DVD (2h 25 min.), NTSC, colour. Original title: Minority Report

4. CONCLUSION

The concern that the state will start to defend itself, to serve its own interest is not baseless. The recent history of our species in the 20th century has taught us how this will end.

And neither has the legislator's choice to remain silent on state terrorism gone unnoticed, a living presence in the memory of many and on the bodies of others, and which is based on the dehydration of the protective essence of fundamental rights precisely under the argument of protecting a greater collective good, as exemplified by the issue of *17 Atos Institucionais* (17 Institutional Acts) (AI) between April 9, 1964 and October 14, 1969, and the resulting "years of lead." We reference the emblematic AI-5 (Institutional Act Number Five) dated December 13, 1968:[25]

Institutional Act Number Five of December 13, 1968.	Suspends the guarantee of *habeas corpus* for certain crimes; grants the President of the Republic the power to declare: a state of siege in the cases specified in the 1967 Federal Constitution; federal intervention without constitutional limits; suspension of political rights and restriction on the exercise of any public or private right; cassation of electoral mandates; recess of the National Congress, Legislative Chambers, and Council Chambers; Excludes from judicial review acts performed in accordance with its regulations and resultant Complementary Acts; and makes other provisions.

We also believe that the legislator missed an opportunity to promote legal security once and for all, removing once and for all the aspirations of protecting the values of the Brazilian Constitutional State by a legal mechanism created in an authoritarian context and of dubious applicability to the protection of current democratic values, as is the case of Law No. 7.170/83, which also characterises terrorist acts.[26]

The legislative response to the country's commitment in the international sphere through the numerous treaties mentioned on the criminalization of terrorism left much to be desired, distancing itself from the aspirations of the signed treaties, reducing the crime of terrorism to a crime of danger, insisting, erroneously, on an outmoded view on the preventive nature of the criminal sanction, and also introducing asymmetries and contradictions in the Brazilian Criminal Code through the provision for punishment of preparatory acts and the use

[25] Available at: <http://www4.planalto.gov.br/legislacao/portal-legis/legislacao-historica/atos-institucionais>.
[26] Available at:<http://www.planalto.gov.br/ccivil_03/leis/l7170.htm>.

of a different logic to the current one, in which the crime of danger is not absorbed by the crime of damage.[27].

Finally, in a context beset by a deep crisis of institutional legitimacy, it is expected that the jurisprudence of the courts will always overcome a certain legislative laziness in formulating instruments that are well-structed and coherent from a legal standpoint, transferring to the judiciary the debates that should occur within the political powers.

One cannot accuse the courts of activism when they are compelled to set significant contours for an area of Law that should be governed by strict legality, not for nothing being the last ratio. The legislative response analysed here appears hasty, inadequately considered, and one more in a long sequence of alibi laws enacted on the eve of important events and as a response to an international demand. Already accustomed to legislating with the penal code in hand and at times of internal popular pressure, the Brazilian legislator now exposes his art to the international community.

[27]See article 7 of Law No. 13.260, which allow for an increase in the criminal sanction by a one-third or one-half for the crime of danger if bodily injury or death. In this line, cf. BARBOSA, Renata da Silva Athayde. *Terrorismo e a Lei n° 13.260/16* [Terrorism and Law No. 13.260/16], op. cit. p. 220.

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